81-2372

NO.

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1981

GLORIA DELESDERNIER

Petitioner

VERSUS

LOUIS B. PORTERIE, ET AL

Respondents

PETITION FOR CERTIORARI TO THE
UNITED STATES COURT OF APPEALS,
FOR THE FIFTH CIRCUIT

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QUESTION PRESENTED FOR REVIEW

Whether the United States Court Of Appeals for the Fifth Circuit was correct in holding that motions for recusal under 28 U.S.C. § 455 are subject to a timeliness requirement in light of Congress' specific rejection of such a requirement, and the intent of Congress to increase public confidence in the Federal judiciary, and in light of the Seventh Circuit's conflicting holding on the same issue.

PARTIES TO THE PROCEEDING

The interested parties in these proceedings are as follows:

Gloria Delesdernier, divorced wife of Clay N. Gerald, now wife of Joseph McCurnin

Louis B. Porterie

Claude Duke

John Hantel

Eric Lundin

The Partnership formerly known as Duke, Porterie, & Davidson

St. Paul Fire & Marine Casualty Company.

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U.S.Code Cong & Ad. News, (1974)
6351,6358

46 U.Chi. L. Rev. 236, 263 (1978)

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Petitioner, Gloria Delesdernier Gerald, prays that a writ of certiorari issue to review a judgment and opinion of the United States Court of Appeal, Fifth Circuit.

OPINION BELOW

The opinion of the Court of Appeal, Fifth Circuit, is reproduced in the appendix at pp. 28-68, infra, and is reported at 666 F2d. 116.

JURISDICTION

This action was originally filed in the United States District Court, Eastern District of Louisiana, and jurisdiction is based on diversity of citizenship. 28 U.S.C. § 1332.

Jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254.

The Court of Appeal for the Fifth Circuit rendered its opinion in this matter on January 20, 1982, and rehearing was denied on February 19, 1982.

STATUTORY PROVISIONS

28 U.S.C. § 455 DISQUALIFICATION OF JUSTICE, JUDGE, OR MAGISTRATE

> (a) Any justice, judge, or magistrate of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned.
>
> (b) He shall also disqualify himself in the following circumstances:
>
> > (1) Where he has a personal bias or prejudice concerning a party, or personal knowledge of disputed evidentiary facts concerning the proceeding;
> >
> > (2) Where in private practice he served as lawyer in the matter in controversy, or a lawyer with whom he previously practiced law

served during such association as a lawyer concerning the matter, or the judge or such lawyer has been a material witness concerning it;

(3) Where he has served in governmental employment and in such capacity participated as counsel, adviser or material witness concerning the proceeding or expressed an opinion concerning the merits of the particular case in controversy;

(4) He knows that he, individually or as a fiduciary, or his spouse or minor child residing in his household, has a financial interest in the subject matter in controversy or in a party to the proceeding, or any other interest that could be substantially affected by the outcome of the proceeding;

(5) He or his spouse, or a person within the third degree of relationship to either of them, or the spouse of such a person;

(i) Is a party to the proceeding, or an officer, director, or trustee of a party;

(ii) Is acting as a lawyer in the proceeding;

(iii) Is known by the judge to have an interest that could be substantially affected by the outcome of the proceeding;

(iv) Is to the judge's knowledge likely to be a material witness in the proceeding.

(c) A judge should inform himself about his personal and fiduciary financial interests, and make a reasonable effort to inform himself about the personal financial interests of his spouse and minor children residing in his household.

(d) For the purposes of this section the following words or phrases shall have the meaning indicated:

(1) "proceeding" includes pretrial, trial, appellate review, or other stages of litigation;

(2) the degree of relationship is calculated according to the civil law system;

(3) "fiduciary" includes such relationships as executor, administrator, trustee, and guardian;

(4) "financial interest" means ownership of a legal or equitable interest, however small, or a relationship as director, adviser, or other active participant in the affairs of a party, except that:

(i) Ownership in a mutual or common investment fund that holds securities is not a "financial interest" in such

securities unless the judge participates in the management of the fund;

(ii) An office in an educational, religious, charitable, fraternal, or civic organization is not a "financial interest" in securities held by the organization;

(iii) The proprietary interest of a policyholder in a mutual insurance company, of a depositor in a mutual savings association, or a similar proprietary interest, is a "financial interest" in the organization only if the outcome of the proceeding could substantially affect the value of the interest;

(iv) Ownership of government securities is a "financial interest" in the issuer only if the outcome of the proceeding could substantially affect the value of the securities.

(e) No justice, judge, or magistrate shall accept from the parties to the proceeding a waiver of any ground for disqualification enumerated in subsection (b).Where the ground for disqualification arises only under subsection (a), waiver may be accepted provided it is preceded by a full disclosure on the record of the

STATEMENT OF THE CASE

(A) Course of Proceedings Below

Plaintiff brought a civil action against her former attorney, Louis Porterie, and his partners, Claude Duke, John Hantel and Eric Lundin, and their malpractice insurer, St. Paul Fire & Marine Casualty Company. Jurisdiction is based on diversity. Plaintiff alleged that her attorney, the defendant, failed to press her claims to property located in Plaquemines Parish, Louisiana, and that he defamed her, causing her damage.

After plaintiff filed her complaint, the defendants answered and there were rather routine amendments to plaintiff's petition with answers.

Defendants then filed a Motion for Partial Summary Judgment seeking to strike certain of plaintiff's demands as premature because the suits they arose out of were still pending in Plaquemines Parish. The trial judge, Judge Alvin B. Rubin, granted partial Summary Judgment and after that the issues remaining to be tried were those of the defendant's defamation of the plaintiff, and the plaintiff's mental anguish due to the negligent manner in which the defendant terminated his employment.

Trial was scheduled to begin on February 14, 1977 before Judge Rubin. Before the trial commenced, Judge Rubin called the attorneys and the plaintiff into his chambers where he informed them that because of past associations with Mr. Porterie and Mr. Duke, he would feel

obligated to disqualify himself from presiding at a trial should the plaintiff decide to waive the jury. However, the plaintiff did not desire to waive the jury, and Judge Rubin presided at the trial (Appendix B, page 69).

The trial was held on February 14, 15, 16, 1977, after which the jury returned a verdict of $25,000.00 in favor of the plaintiff on the issue of mental anguish due to defendant's negligence. The jury determined that the defendant had not defamed the plaintiff.

Both parties filed post-trial motions for new trials. The Trial Court denied the plaintiff's Motion for a New Trial on the defamation issue and denied the defendant's Motion for a Judgment N.O.V., but granted the defendant's Motion for Remittitur and, alternatively, for a new trial, ordering the plaintiff to

accept the $10,000.00 rather than the $25,000.00 or face a new trial. Plaintiff refused the remittitur, and a new trial was ordered. The Court, in ordering the remittitur, made only a minute entry and did not give its reasons for granting the remittitur, or how it arrived at its conclusion relative to the amount of the remittitur, and did not specify which issues were to be tried at the new trial.

Plaintiff's original trial attorney, Charles Chesnutt, withdrew shortly after the post-trial motions were ruled on. Mr. Chesnutt moved to Texas and entered a seminary and took no further part in the proceedings.

During the intervening period of time Judge Rubin was elevated to the Fifth Circuit Court of Appeals, and Judge Robert Collins became the presiding judge in Section C.

Defendants filed a Motion to Limit Issues at the second trial in an attempt to exclude the issues of defamation and damages from that trial. Judge Collins, after consulting with Judge Rubin, eventually ruled that the issue of defamation would be excluded at the second trial. Thus plaintiff did not receive a new trial as to the issue of defamation.

The trial court agreed with the jury when they found in favor of the defendant and overruled the jury when they were in favor of petitioner. The verdict relative to defamation was allowed to stand in spite of confusing and conflicting jury instructions given during the course of trial and at the close of the trial.

On September 22, 1979 the case was re-allotted due to the addition of judges to the Eastern District of Louisiana, and

the case was assigned to Judge Peter Beer, Section M.

The second trial, which was limited to the issue of defendant's negligence and mental anguish, was held before Judge Beer on June 9 and 10, 1980 and the jury returned a verdict in favor of the plaintiff and found damages in the sum of $1,500.00. Judgment was entered accordingly and plaintiff then appealed to the United States Fifth Circuit Court of Appeal.

(B) Statement of the Facts

Plaintiff, Gloria Delesdernier, employed Louis Porterie and his law firm, then known as Duke, Porterie & Davidson, to represent her relative to claims to property located in Plaquemines Parish,

Louisiana. Plaintiff claimed ownership to the disputed lands through her father and grandfather. The claims involved, among other things, a purported simulated transfer by her grandfather to her uncles and other individuals and irregularities in the handling of plaintiff's tutorship proceedings during the time the plaintiff was a minor. All of these transactions occurred during the 1930s and involved land that would later be found to be "floating" on oil.

Plaintiff and defendant entered into an employment contract on March 1, 1957. Defendant proceeded with his representation by filing various petitions in Plaquemines Parish, including new suits and reopening some previously opened Succession proceedings.

Some fifteen years later the cases had not come to trial. During this time

some issues were appealed and the cases were remanded back to the State District Court.

Finally, a trial date was set for October 16, 1972. As the time for the trial approached, defendant began pressuring plaintiff to accept a settlement. Correspondence went back and forth between the parties relative to the settlement.

Finally the defendant sent plaintiff a letter dated August 9, 1972 wherein he mailed interrogatories and request for admissions to the plaintiff and complained that he could never get her into his office to answer them. He also urged plaintiff to again accept the $50,000.00 settlement offer at that time.

In response to defendant's letter, the plaintiff came into town from Jackson, Mississippi where she was living, to work

on the case. At that point, the defendant, Porterie, told the plaintiff that he "wasn't going to do anything" and he instructed her to return to Jackson to get a letter he had sent to her. The letter was dated August 11, 1972. This letter was a long recital of the defendant's complaints about his client and ended up with him resigning from the case and "refusing to proceed".

Plaintiff suffered severe emotional distress in the manner of her attorney's withdrawal from the case because he had represented her for fifteem years, they were about two months away from trial, and there were certain interrogatories and requests for admission that had to be answered. Due to this fact and the concern about her case, the plaintiff picked up her files from Mr. Porterie's office using the key that he

had given her to enter the office; and she began the task of representing herself in the Plaquemines Parish suits.

In connection with these incidents, Mr. Porterie wrote a letter to the plaintiff, accusing her of illegally removing the files from his office. He later reiterated the charge in the intervention he filed in Plaquemines Parish. This charge of illegal entry further distressed plaintiff and also gave rise to her claim of defamation against the defendant Porterie.

After Mr. Porterie's withdrawal as her attorney, plaintiff handled some of the Plaquemines Parish cases on her own and employed other attorneys on an hourly basis to assist her. Eventually, some more of the defendant's exceptions were sustained in Plaquemines Parish, and those judgments were appealed and some of those

exceptions were affirmed on appeal in the Louisiana Fourth Circuit Court of Appeal and part of the cases were again remanded to Plaquemines Parish.

On August 13, 1973, plaintiff filed the present suit against the defendant for malpractice, negligence and defamation.

REASONS FOR GRANTING THE WRIT

A. THE DECISION OF THE FIFTH CIRCUIT COURT OF APPEALS, WHICH ENACTS A TIME LIMIT PROVISION INTO 28 U.S.C. ARTICLE 455, IS IN CONFLICT WITH A DECISION OF THE SEVENTH CIRCUIT COURT OF APPEAL WHICH HAS HELD NO TIME LIMIT PROVISION CAN APPLY TO ISSUES ARISING UNDER THIS STATUTE.

It is apparently conceded by the Fifth Circuit that under 28 U.S.C. § 455, Judge Rubin should have recused himself rather than presiding at the jury trial. The question then became whether the issue

of Judge Rubin's failure to recuse himself could be raised for the first time on appeal. The Fifth Circuit has ruled that a recusal motion must be raised by a party on a timely basis, and cannot be raised for the first time on appeal.

In conflict with that decision is SCA SERVICES, INC. v. MORGAN, 557 F.2d 110 (1977). In the Morgan case, the plaintiffs raised the issue of recusal before trial on the merits but after they had participated in numerous proceedings in the case at the district level. The Court stated:

> "The provisions are mandatory; they are addressed to the judge and require that he disqualify himself in certain circumstances. They were adopted because the drafters of the statute believed 'that confidence in the impartiality of federal judges is enhanced by a more strict treatment of waiver.' They impose no duty on the parties to seek disqualification nor do they contain any time limit within which disqualification must be sought.

> Moreover, although the Department of Justice recommended that the new Section 455 should include some limitation of time 'to prevent applications for disqualification from being filed near the end of a trial when the underlying facts were known long before,' (H.R.Rep. No. 1453, 932d Cong.,2d Sess. 9 (1974) U.S.Code Cong. & Admin. News, 1974, p.6358), Congress did not incorporate this recommendation in the statute. Because it is obvious that any decision to deny disqualification based on grounds of waiver and estoppel would frustrate the purpose of the statute, these defenses to the petition are without merit." (Emphasis added)

The Seventh Circuit's, holding in SCA Services is in direct conflict with the Fifth Circuit's holding in the present case. Even though the Seventh Circuit was not addressing itself to the issue of recusal raised for the first time on appeal, the Court's language is clear, concise and unequivocal that it feels that there are no time limits in the statute for disqualification to be raised.

B. THE FIFTH CIRCUIT'S DECISION IN PLACING A TIME LIMIT PROVISION INTO 28 U.S.C. § 455 IS AN IMPORTANT QUESTION OF FEDERAL LAW WHICH HAS NOT BEEN BUT SHOULD BE SETTLED BY THIS COURT.

Petitioner could find no case, and believes there are no cases, which have been decided by this Court since the 1974 amendments to 28 U.S.C. § 455.

The interpretation of this law is of national importance and should be settled by this Court. As the Fifth Circuit stated in its opinion, "one of the purposes of the statute is to increase public confidence in the judiciary by removing even the appearance of impropriety or partiality". Therefore, it is important to the nation that uniformity be established throughout all the Circuits and that the proper interpretation be placed upon the statute. It is

respectfully submitted that the Fifth Circuit erred when it read into the statute a time limit requirement.

Judge Rubin's revelations were not set out in full in the Fifth Circuit's opinion, but are included in full in Appendix B. The judge's remarks were obviously made with the highest intentions.[1] However, once he revealed his relationship to the defendants, he became obligated to recuse himself under § 455. This obligation to recuse himself was not dependent on a motion by any party in the case, as is clear from the statute, and the Fifth Circuit makes clear in its opinion that the statute is directed to judges and not litigants.[2]

---

1. Neither the statutes nor the cases set a separate standard for jury and non-jury trials as Judge Rubin attempted to do when he spoke to Mrs. Delesdernier.

The Fifth Circuit attempted to avoid the issue of manditory recusal under § 455 (B) by stating in a footnote, "her motion was made only with respect to § 455 (A). Petitioner raised the issue of recusal as an assignment of error on appeal, not as a "motion" limited to any particular section of a statute. Petitioner listed the entire statute (28 U.S.C. § 455) in her Table of authorities presented to the Fifth Circuit. Petitioner quoted only from § 455 (A) in the text of her brief, but she did state that Judge Rubin should have recused himself because of the reasons he stated before the first trial, which include reasons under both sections A and B of

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2. It should be noted that Judge Rubin made it clear that he felt fully capable of presiding at a jury trial. Therefore, even a timely motion for recusal made at that point would have been pointless because it obviously would have been denied.

§ 455. The limitation of consideration to § 455 (a) is unfair to petitioner and, in effect, is an attempt to impart the rules of Common Law pleading to appeleate briefs.

What the Fifth Circuit has done is to "legislate" into 28 U.S.C. § 455 a timeliness requirement where none exists in the law. Prior to 1974, 28 U.S.C. § 144 contained a timeliness provision. This provision was always read together with 28 U.S.C. § 455. Congress amended § 455 in 1974 "with a view to stiffening the conflict of interest provisions for the Federal judiciary", PUB.L.93-512. §1.

The legislative history shows that Congress specifically rejected a suggestion by the Justice Department that the new § 455 contain an explicit timeliness limitation. (1974) U.S.Code CONG & AD. NEWS, 6351, 6358.

It is obvious from the legislative history of the law that Congress intended to eliminate the timeliness provision in the law. However, if Congress thought it had buried the timeliness requirement, the Fifth Circuit has resurrected it.

Even the Fifth Circuit conceded that the statute's legislative history and "the general purposes behind the statute as well as the statute's language might seem to indicate that no timeliness requirement should obtain" (Appendix A, p.46). The Fifth Circuit then points out that the statute is directed to judges and not litigants and that it is meant to be self-enforcing. Further, they point out that the purpose of the statute is to increase public confidence in the judiciary by removing even the appearance of impropriety or partiality.

Aligned against the arguments for not requiring a time limit, the Fifth

Circuit gave one reason why they should include a timeliness provision. Their sole reason for enacting a timeliness requirement was that a lawyer may purposely delay in making his recusal motion so that he can get a new trial if dissatisfied with the results of the first trial.[3] There was no other reason advanced by the Fifth Circuit for their enactment of the time limitation.

The Fifth Circuit's reasoning is questionable in that it assumes that attorneys will want to go to trial with a judge they know to be prejudiced against them in the hopes of gaining a new trial

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3. The Fifth Circuit implies that the issue was raised by Mrs. Delesdernier for the first time on appeal in an attempt at "bad faith manipulation of court rules for litigious advantage". Petitioner's first attorney withdrew shortly after the first trial, and present counsel was not retained until some two years after the first trial, and did not discover the possible issue of recusal until preparing for the appeal after the second trial.

on appeal rather than assuming that an attorney would rather have a judge who is prejudiced removed at the earliest possible moment.

The authority relied upon by the Fifth Circuit for enacting this timeliness requirement was a Law Review note entitled Disqualification of Federal Judges for Bias or Prejudice, 46 U.Chi.L.Rev.236, 263 (1978).

The Fifth Circuit has attempted to eliminate a possible problem for the Federal Courts by placing a time limit requirement in § 455. In so doing, however, it gave no consideration to the fact that Congress may have foreseen that late motions may occasionally be made for litigious advantage (Which is not the fact in this case), but this problem was far outweighed by Congress' desire to stiffen the laws of conflict of interest and

increase public confidence in the Federal judiciary.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the Fifth Circuit Court of Appeal.

Respectfully submitted,

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CERTIFICATE

I hereby certify that I have on this 25th day of June 1982 served three copies of the foregoing petition upon H. Martin Hunley, Jr., attorney for respondent, and that all parties required to be served have been served.

ROGER R. ROY

APPENDIX A

OPINION OF THE FIFTH CIRCUT

COURT OF APPEAL

Appeal from the United States District Court for the Eastern District of Louisiana.

Before POLITZ and RANDALL, Circuit Judges, and GORDON, District Judge.

RANDALL, Circuit Judge

This case involves a suit for malpractice arising out of defendants' representation of plaintiff in a protracted litigation of land claims. The malpractice litigation itself has gone through two full trials and plaintiff now seeks reversal and a third trial. For the reasons stated below, we affirm.

In March of 1957, plaintiff Gloria Delesdernier employed defendant Louis Porterie and his law firm, then known as Duke, Porterie & Davidson, to represent

her in connection with her claims to various properties located in Plaquemines Parish, Louisiana. This litigation continued under Porterie's direction for over fifteen years. Delesdernier assisted in the preparation of her case; in order to facilitate the work on the litigation, she was given a key to Porterie's office and the case file was kept in a special place where she could work on the file after hours.

A trial date was finally set for October 16, 1972. Porterie consistently made it clear that he wanted Delesdernier to settle the case instead of going to trial, but Delesdernier refused. Finally, Porterie informed Delesdernier in a letter, dated August 11, 1972, that he refused to proceed any further on her behalf and that he was resigning from the

case. The trial date being only two months off, Delesdernier picked up the case files from Porterie's office using the key she had been given and began representing herself in the litigation. Porterie thereafter wrote a letter to the plaintiff on August 17, 1972, accusing her of illegally removing the files from his office. On August 13, 1973, Delesdernnier filed the present suit against Porterie, his partners Claude Duke, John Hantel, and Eric Lundin, and the malpractice insurer, St. Paul Fire & Marine Casualty Company, claiming defamation, breach of contract, malpractice, and negligent infliction of emotional distress. Among other things, Delesdernier claimed that she suffered severe mental anguish as a result of her attorney's withdrawal from her case because he had represented her for fifteen years, and then had left her without

counsel only two months away from trial with certain interrogatories and requests for admissions still to be answered.

Trial was scheduled for February 14, 1977, before then District Judge (now Circuit Judge) Alvin B. Rubin. Before trial commenced, the judge called the attorneys and plaintiff into his chambers. He informed them that he had some concern about his ability to act as a trier of fact if the parties elected to try the case without a jury:

THE COURT:

> Yesterday afteroon, Mr. Chesnutt [counsel for Delesdernier] mentioned to me that both parties were considering the possibility of a non-jury trial. You do have a right to a non-jury trial, if you want one; and if you do elect to have one, I would ask another judge to hear the case, because while I don't believe I know either Mr. Porterie or Mr. Duke well enough to prevent me from presiding over a jury trial, I do believe that if a matter came down to

credibility of witness, that I would not want a juror sitting in the case who knew the parties to that degree.

. . . . . .

The judge explained that he was an acquaintance of both Porterie and Duke but was not "social friends" with either. He proceeded to give a detailed account of the circumstances in which he met both men and how he was acquainted with them. He explained further:

> I don't know either of them any better than I know three or four hundred lawyers in New Orleans. But I do know three or four hundred lawyers well enough that I wouldn't want to be in the jury where they were on one side and a non-lawyer was on the other side.
>
> So, if you wish to try the case to a jury, I see no reason to disqualify myself. I can be, I think, completely objective in my rulings, and I don't have any feeling that my degree of friendship with either of them would affect any legal rulings I make. I do have a feeling that my degree of acquaintanceship with them might have some weight one way or the other in weighing credibility if either or both of them testify. It might, indeed,

> weigh against them. I'm not sure. It might be that I would lean over backwards. But, in either event, they are entitled to somone who will neither lean forewards nor backwards, but just stay straight up in the middle.
>
> So, the net of that is that if you and Mr. Chesnutt decide that you do want a non-jury trial, I won't require you to have a jury trial, but I will re-allot the case to another judge. That's what we do all the time when that problem arises.

Delesdernier did not wish to waive her right to a jury, and as neither side objected to Judge Rubin as a trial judge, he presided at the trial. After a three day trial, the jury returned a verdict of $25,000 for negligent infliction of mental anguish. The jury also determined that the defendants had not defamed Delesdernier. The breach of contract issue was dismissed without prejudice at the close of plaintiff's case.

After the trial, Delesdernier moved for a new trial on the issue of

defamation. The court denied this motion. It also denied defendants' motion for a judgment N.O.V. on the negligence issue. However, the court granted defendants' motion for a remittitur and in the alternative for a new trial; specifically, it ordered Delesdernier to accept an award of $10,000 or face a new trial. Delesdernier refused the award, and a new trial was ordered. The court's remittitur order was made in a minute entry and did not discuss which issues would be retried if the remittitur were refused.

Subsequently, Judge Rubin was appointed to this court. Judge Robert Collins became the presiding judge assigned to replace him. Judge Collins ruled that the second trial would be limited to the issue of negligence, and that the issue of defamation would be excluded. On September 22, 1979, the case

was reassigned to Judge Peter Beer, who presided at the second trial, held on June 9 and 10, 1980. In the second trial, the jury found for Delesdernier on the negligence issue, but awarded her only $1,500. Delesdernier then brought the present appeal, claiming that errors were committed by the district judges in both her trials.

Disqualification Issues

Delesdernier's first point on appeal is that Judge Rubin should have disqualified himself from the first trial under the judicial disqualification provisions of 28 U.S.C. § 455(a):

> Any justice, judge, or magistrate of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned.

Delesdernier's argument is based on Judge Rubin's claim that he would have to recuse himself if the parties asked him to act as a trier of fact in a bench trial. He did this because he believed that his degree of acquaintanceship with defendants Porterie and Duke might have some weight in assessing the credibility of their testimony. However, argues Delesdernier, when Judge Rubin considered whether to grant a remittitur and a new trial in the alternative, he was required to weigh the credibility of the witnesses in any event; this is because a motion for a new trial requires the judge to decide if the verdict is against the great weight of the evidence.[1]

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1. E.g., Conway v. Chemical Leaman Tanklines, Inc., 610 F.2d 300 (5th Cir.1980); Taylor v. Fletcher Properties, Inc., 592 F.2d 244 (5th Cir.1979); Spurlin v. General Motors Corp., 528 F.2d 612 (5th Cir.1976); Cities Service Oil Co. v. Launey, 403 F.2d 537 (5th Cir.1968); see also 6A Moore's Federal Practice ¶59.08(5)(2d ed.1976)(explaining that in passing on a motion for a new trial a judge must evaluate and weigh evidence.)

Defendants argue in reply that even if this is so, Delesdernier has raised this argument for the first time on this appeal, whereas Judge Rubin's disclosures were made prior to the first trial. Delesdernier should have raised the argument concerning the possibility that Judge Rubin would have to weigh evidence at that point. After all, a motion for a new trial by the losing party is hardly an unforseeable event in a jury trial -- indeed it is usually offered as a matter of course by any counsel with more than limited experience. In any case, a motion for disqualification was not raised even after defendants did move for a new trial. Defendants thus insist that the lack of timeliness of the motion prevents our consideration of it now.

In order to decide to what extent a motion for disqualification under §455(a)[2] must be timely made, a preliminary discussion of the history of the statute and related provisions is necessary. Prior to 1974, there were two relevant provisions concerning disqualification of federal judges. These were 28 U.S.C. § 144 and an earlier version of 28 U.S.C. § 455 (amended 1974):

§ 144. Bias or prejudice of judge

> Whenever a party to any proceeding in a district court makes and files a timely and sufficient affidavit that the judge before whom the matter is pending has a personal bias or prejudice either against him or in favor of any adverse party, such judge shall proceed no further therein, but another judge shall be assigned to hear such proceeding.

---

2. Although Delesdernier might also have argued disqualification under other portions of § 455, her motion was made only with respect to § 455(a). Thus we are concerned here only with the question of timeliness requirements under that section of the statute.

The affidavit shall state the facts and the reasons for the belief that bias or prejudice exists, and shall be filed not less than ten days before the beginning of the term at which the proceeding is to be heard, or good cause shall be shown for failure to file it within such time. A party may file only one such affidavit in any case. It shall be accompanied by a certificate of counsel of record stating that it is made in good faith.

§ 455. Interest of justice or judge

Any justice or judge of the United States shall disqualify himself in any case in which he has a substantial interest, has been of counsel, is or has been a material witness, or is so related to or connected with any party or his attorney as to render it improper, in his opinion, for him to sit on the trial, appeal, or other proceeding therein.

Section 144 contains an explicit requirement of timeliness. The earlier version of § 455 does not. In 1974, Congress amended § 455 with a view to stiffening the conflict of interest provisions for the federal judiciary.

Act of December 5, 1974, Pub.L.93-512, § 1,88 Stat. 1609, as amended by Act of Nov. 6, 1978, Pub.L. 95:598, Title II, § 214(a), (b), 92 Stat. 2661. The present version of § 455 now provides, in pertinent part:

§ 455 Disqualification of justice, judge, or magistrate

(a) Any justice, judge, or magistrate of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned.

(b) He shall also disqualify himself in the following circumstances:

(1) Where he has a personal bias or prejudice concerning a party, or personal knowledge of disputed evidentiary facts concerning the proceeding;

(2) Where in private practice he served as lawyer in the matter in controversy, or a lawyer with whom he previously practiced law served during such association as a lawyer concerning the matter, or the judge or such lawyer has been a material witness concerning it;

(3) Where he has served in governmental employment and in such capacity participated as counsel, adviser or material witness concerning the proceeding or expressed an opinion concerning

the merits of the particular case in controversy;

(4) He knows that he, individually or as a fiduciary, or his spouse or minor child residing in his household, has a financial interest in the subject matter in controversy or in a party to the proceeding, or any other interest that could be substantially affected by the outcome of the proceeding;

(5) He or his spouse, or a person within the third degree of relationship to either of them, or the spouse of such a person;

(i) Is a party to the proceeding, or an officer, director, or trustee of a party;

(ii) Is acting as a lawyer in the proceeding;

(iii) Is known by the judge to have an interest that could be substantially affected by the outcome of the proceeding;

(iv) Is to the judge's knowledge likely to be a material witness in the proceeding.

....

(e) No justice, judge, or magistrate shall accept from the parties to the proceeding a waiver of any ground for disqualification enumerated in subsection (b). Where the ground for disqualification arises only under subsection (a), waiver may be accepted provided it is preceded by a full disclosure on the record of the basis for disqualification.

The new version of § 455 followed for the most part the language of Canon 3 C of the ABA Code of Judicial Conduct. See H.R.Rep.No.93-1453, 93d Cong., 2d Sess. 4-5, reprinted in [1974] U.S.Code Cong. & Ad.News 6351, 6353-54. The new § 455 also adopted some of the language from § 144, and this circuit has held that "substantively the two statutes are quite similar, if not identical." Phillips v. Joint Legislative Committee, 637 F.2d 1014, 1019 & n.6 (5th Cir. 1981); see Davis v. Board of School Commissioners of Mobile County, 517 F.2d 1044 (5th Cir.1975), cert. denied, 425 U.S.944, 96 S.Ct.1685, 48 L.Ed.2d 188 (1976)(Section 144 and new section 455 are to be construed in pari materia and same substantive test of bias would be applied.)

Two things about the 1974 version of § 455 are worthy of note. The first is that the statute now contains a waiver provision for situations falling within the general provisions of § 455(a) if full disclosure is made, but waiver is not possible if the situation falls within one of the specific categories listed in § 455(b). The second point is that even after the 1974 amendment, § 455 still contains no explicit procedural requirements.

The legislative history of the 1974 amendment reveals that the Justice Department suggested that the new statute should include some explicit limitation of time similar to § 144 "to prevent applications of disqualification from being filed near the end of a trial when the underlying facts were known long before," H.R. Rep.No.93-1453, 93d Cong.,

2d Sess. 9, reprinted in (1974) U.S.Code Cong. & Ad. News 6351, 6358. However, Congress did not, for reasons of its own, incorporate this recommendation into the statute. One court has read this fact as proof that Congress did not intend any timeliness requirements for § 455. SCA Services, Inc. v. Morgan, 557 F.2d 110, 117 (7th Cir.1977). However, prior to the 1974 amendment courts had generally held that a timely objection under the old § 455 was necessary. E.g., Adams v. United States, 302 F.2d 307,309 (5th Cir. 1962); 13 Wright, Miller & Cooper, Federal Practice and Procedure: Civil § 3553 at 382 n.1 and cases cited therein. Thus "Congress' failure to act could as easily have been the result of a belief that the judicial gloss on old section § 455 would survive." Note, Disqualification of Federal Judges for Bias or Prejudice, 46

U.Chi.L.Rev. 236, 263 (1978) (hereinafter cited as Disqualification of Judges); see Davis v. Board of School Commissioners of Mobile County, supra (New § 455 was designed to eliminate only specific judicial gloss given statute by subjective "opinion of judge" test and "duty to sit" test; judicial gloss on statute requiring that bias be extra-judicial remains in full force after new enactment.)

We thus are unconvinced that the question is conclusively determined by the legislative history of the 1974 amendments, and we must base our decision on other considerations as well. The general purposes behind the statute as well as the statute's language might seem to indicate that no timeliness requirement should obtain. First, the statute is directed to judges, not to litigants, and it is meant

to be self-enforcing. Thus whenever the judge is called upon to disqualify himself he should be prepared and required to consider the propriety of his remaining in the case. Second, the purpose of the statute is to increase public confidence in the judiciary by removing even the appearance of impropriety or partiality. That policy is not served by permitting an arguably biased judge to remain in a case simply because an incompetent or insufficiently diligent counsel failed to raise a timely objection.

Despite the force of these arguments, the lack of a timeliness rule has its own problems. If disqualification may be raised at any time, a lawyer is then encouraged to delay making a § 455(a) motion as long as possible if he believes that there is any chance that he will win

at trial. If he loses, he can always claim the judge was disqualified and get a new trial. This result would not comport well with the purposes behind § 455(a). As one commentator has put it:

> The public is not likely to be convinced that a judge is any less biased merely because the facts that cast doubt upon his impartiality were not complained about until well into the proceeding. On the other hand, it might legitimately be asked whether the spectacle of an attorney dragging his opponent through a long and costly proceeding, only to conclude by moving for disqualification of the judge, is not equally detrimental to public impressions of the judicial system.

Note, Disqualification of Judges, supra, at 263-64 n.155. Lack of a timeliness requirement encourages speculation and converts the serious and laudatory business of insuring judicial fairness into a mere litigation stratagem. Congress did not enact § 455(a) to allow counsel to make a game of the federal judiciary's ethical obligations; we should

seek to preserve the integrity of the statute by discouraging bad faith manipulation of its rules for litigious advantage.

We are thus convinced that timeliness may not be disregarded in all cases regarding disqualification under § 455(a)[3]. Moreover, we think that the facts

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3. Both the Second and Ninth Circuits have held that some sort of timeliness requirement is appropriate for the present version of § 455. In Re International Business Machine Corp., 618 F.2d 923 (2d Cir.1980); United States v. Daley, 564 F.2d 645, 651 (2d Cir.1980), cert. denied, 435 U.S.933, 98 S.Ct. 1508, 55 L.Ed.2d 530 (1978); United States v. Conforte, 624 F.2d 869 (9th Cir.), cert. denied, 449 U.S. 1012, 101 S.Ct. 568, 66 L.Ed.2d 470 (1980). Accord, City of Cleveland v. Cleveland Elec. Illuminating Co., 503 F.Supp. 368 (N.D.Ohio 1980); Cf. Satterfield v. Edenton-Chowan Board of Education, 530 F.2d 567, 574-75 (4th Cir.1975), and cases cited therein at n.21; United States v. Patrick, 542 F.2d 381, 390 (7th Cir.1976), cert. denied, 430 U.S.931,97 S.Ct. 1551, 51 L.Ed.2d 775 (1977); Marcus v. Director, Office of Workers' Compensation Programs, U.S. Department of Labor, 548 F.2d 1044, 1051 (D.C.Cir.1976), and cases cited therein at n.21 (stating general rule that one must raise the issue of disqualification of the trier, whether he be a judge, administrator, or an arbitrator, at

of the present case are well suited to a timeliness requirement. Here the trial

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the earliest practicable moment after relevant facts become known). Only the Seventh Circuit has stated its opposition to any timeliness requirement. SCA Services, Inc. v. Morgan, 557 F.2d 110 (7th Cir.1977). Conforte, supra, described SCA's holding as dicta, since in SCA the objection to the qualification was made before trial on the merits. However, we note that dictum or not, SCA has been followed by at least one district court in the Seventh Circuit. Muench v. Israel, 524 F.Supp. 1115 (E.D.Wis.1981). As mentioned supra, the Court in SCA relied on the legislative history of § 455. See also Idaho v. Freeman, 507 F.Supp. 706,720 (D. Idaho 1981)(concluding that "the procedural requirements, or the lack thereof, are carried over from the prior section [455]"). However, as we have pointed out, the argument from legislative history is one which cuts both ways, for if the procedural requirements from the old § 455 are carried over into the new, this would suggest that a timeliness requirement obtains.

One decision of this circuit had previously considered the timeliness issue, but found it unnecessary to decide the issue on the facts of the case. Potashnick v. Port City Construction Co., 609 F.2d 1101 (5th Cir.), cert. denied, 449 U.S. 820, 101 S.Ct. 78, 66 L.Ed.2d 22 (1980). In Potashnick, the court noted that the trial judge could have been disqualified under two

judge raised the possibility of disqualification himself at the very beginning. Before trial began, he gave a

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separate provisions of § 455: (1) the judge's prior business dealings with one of the attorneys in the case raised a problem under § 455(a) and (2) the fact that the judge's father was a senior partner in that attorney's firm was grounds for disqualification under § 455(b)(5)(iii). The first ground was not discovered by the opposing side until after trial had been concluded; the second ground had been known to all parties from the inception of the case. The court held that waiver was not possible as to the first ground, since there had been no full and fair disclosure. As to the second ground, the opposing party, Port City, made no motion asking for disqualification even when the trial judge indicated that he would accede to such a suggestion. Nevertheless, this ground, like the previous one, was raised for the first time on appeal. The court held that the second ground, based as it was on § 455(b), could not properly be subject to waiver. It then considered the possibility that the second ground raised was untimely; it noted that the language of the statute made no mention of any timeliness requirement, and mentioned the argument made in SCA in passing. However, it concluded that "[w]e need not decide, however, whether a reversal on this ground alone would be foreclosed by Port City's failure to raise the issue of disqualification, or to even make an issue when invited to do so by the judge, until judgment was entered against it. The prior ground for reversal is sufficient to mandate a new trial," Id. at 1115. Thus although there were grounds for disqualification under § 455(b), the court in

full and fair disclosure of his situation as regards defendants Porterie and Duke, and indeed described his acquaintance with

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Potashnick did not decide the timeliness question with respect to it, since adequate grounds existed under § 455(a). However, the issue is squarely before us today, and we have decided to follow the approach of the Second and Ninth Circuits, basing our decision on the view expressed in Potashnick itself that "[a]lthough section 455 places the obligation to disqualify with the judge, a litigant should not be permitted to utilize a disqualification issue as part of his trial strategy." Id.

One commentator has argued that a distinction should be drawn between § 455(a) and § 455(b) with respect to timeliness. Note, Disqualification of Judges, supra, at 265. Grounds for disqualification under § 455(a) permit a waiver after full disclosure of all relevant facts, while grounds under § 455(b) do not. This might suggest that arguments for timeliness under § 455(b) have less force, or at least that a requirement of timeliness under § 455(b) should be less stringent than one under § 455(a). However, we note that both Conforte, supra, and In Re International Business Machines, supra, involved motions for disqualification under § 455(b) (Conforte involved a motion under § 455(a) as well), and in both these cases the § 455(b) motions were held untimely. Because Delesdernier only raised a motion for disqualification under § 455(a) as an issue, we need not decide if considerations of timeliness would be different under § 455(b).

them in painstaking detail. Thus it cannot be seriously argued that Delesdernier or her counsel were unaware before trial began of facts which might arguably support a § 455(a) motion for disqualification.[4] We think that the motion raised for the first time on appeal, and after two full trials on the merits, is too tardily made for us to consider it now.[5]

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4. Delesdernier argues that Judge Rubin's distinction between his ability to sit at a bench trial or at a jury trial is without merit, since he would have to weigh the evidence if a motion for a new trial were made. If so, this is clearly an argument which could have been raised before trial began. Of course, Delesdernier could not have known for certain that defendant's counsel would move for a new trial if defendant lost; but such motions are regularly proffered by losing counsel; this is true even when there is little chance that they will be granted. In any case, even if the motion for a new trial did come as a bolt from the blue to Delesdernier, no motion for disqualification was made at that point. Nor was a motion made when defendants moved to limit issues to negligence and exclude defamation at the second trial, even though a finding of disqualification would have given Delesdernier a

Remittitur

Delesdernier's second point on appeal is that the trial court's remittitur of her $25,000 verdict to $10,000 was improper. The scope of appellate review of a trial court's order of remittitur in this circuit is set forth in Bonura v. Sea Land Service, Inc., 505 F.2d 665 (5th Cir,1974). The general standard of review is a strict one and the

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new trial on all issues. We emphasize that we do not suggest that a motion for disqualification would have been timely if made at that point. It is not necessary for us to decide when the motion became untimely for the purposes of this appeal, other than to say that it certainly was untimely when raised for the first time before this court. Our point in making these observations is that Delesdernier apparently did not consider the problem worthy of notice at any point in the litigation until after the second trial brought her a smaller money judgment. It is precisely this sort of speculation which a timeliness rule is designed to prevent.

A case in which the relevant information is not discovered until late in the litigation would present an entirely different question. This is suggested by the situation in Potashnick, note 3 supra. Facts which supported the first ground of disqualification were not discovered until after the trial had been concluded. It is

trial court will be reversed only if the party opposed to the remittitur shows an abuse of discretion by the judge. Id. at 669. For an appellate court to find an abuse of discretion, it must appear that the jury's verdict was "clearly within the universe of possible awards which are supported by the evidence." Id. at 670. (emphasis in original). If a remittitur was proper under this standard, the next question is "whether the amount of the

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interesting to note that the court raised the issue of timeliness only with respect to the second ground and not the first. It thus implied that timeliness would not be a concern with the first ground, since the relevant facts were not discovered until after trial. These circumstances are not present in the case before us now. Nor is this a case in which the alleged conduct is especially egregious. In United States v. Conforte, supra, at 880, the Ninth Circuit cautioned that it would "leave open the question of whether timeliness may be disregarded in exceptional circumstances."

5. No better example exists of the potential waste of judicial resources which can be caused by an untimely motion for disqualification than In Re International Business Machines, Inc.,

award remaining after remittitur reflects the maximum award which the evidence will support or whether it merely represents the trial court's opinion of what the proper award should have been." Id. Accord, Geyar v. Vargas Productions, Inc., 627 F.2d 732 (5th Cir.1980); Gorsalitz v. Olin Mathieson Chemical Corp., 429 F.2d 1033 (5th Cir.1970).

We think the record of the first trial supports the trial judge's decision,

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618 F.2d 923 (2d Cir.1980). This case was one of a continuing series of skirmishes in the litigation of United States v. IBM, perhaps the longest and most massive legal battle in American history. IBM's counsel raised the issue of disqualification under § 455 over four years after trial had commenced, after over seventy live witnesses had appeared, and after virtual mountains of documentary evidence had been introduced. The Second Circuit explained:

> We have found no case, and none exists, where a recusal would result in the waste involved here. During the past decade the investment of judicial time and energy as well as that of the parties to this litigation has been immense. IBM is not unconscious of this factor. It therefore urges the assignment of a new judge who would examine the record and purge those parts which reveal extrajudicial 'ias. We are told that a "large part" of the record could thus be salvaged. The issue is

and we find no abuse of discretion in his ordering a remittitur. The evidence obviously supports a finding that Delesdernier suffered some emotional distress from Porterie's withdrawal from her case. However, Delesdernier admitted that she was able to find new counsel to

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> not simply how long this would take but rather whether we could reasonably expect a judge to accomplish the task at all..... The labors of Sisyphus pale by comparison to those that would be imposed upon a new judge, and in the end, the attribution of extrajudicial bias would require extrasensory perception.

Id. at 934. Yet if factors for disqualification under § 455(b) were found, as was urged in that case, no waiver would have been possible; in the absence of a timeliness rule, disqualification would have been mandatory.

The present case does not approach United States v. IBM's gargantuan size and byzantine complexity. However, no small waste of judicial resources is involved here. There have been two full trials on the merits in this case, and disqualification would require a third, at least with respect to the issue of defamation. Although the proportions are smaller, the principle is still the same.

obtain an extension of time for trial shortly after Porterie withdrew. Delesdernier's daughter, Carol Marchand Arnaud, stated that her mother was "in a bad state" after receiving Porterie's letter, and that "she was upset for a couple of weeks." Delesdernier complained of numbness in her face as a result of her nervousness about an upcoming deposition of her uncle, Mark Delesdernier. However, these events occurred in 1975, some three years after Porterie's withdrawal. The deposition itself was eventually taken in 1976. Delesdernier visited a Dr. Labourdette in 1975 and 1977 concerning the numbness in her face. Dr. Labourdette testified that on one of the visits, in May of 1975, Delesdernier described her "marked anxiety" and gave a history of a whiplash injury. Dr. Labourdette recalled

that "she was having some legal procedure going on in April of '75,... and it caused her to be very upset, and ...that is why she came in that particular day." Dr. Labourdette did not give any testimony which connected the numbness in Delesdernier's face in 1975 or her whiplash injury to Porterie's withdrawal in 1972.

Based on the record, we agree with the trial court that the jury's $25,000 verdict is not clearly within the universe of possible awards supported by the evidence. Hence we think a remittitur was proper. As to the $10,000 amount chosen by the court, we note that the trial judge is to be given great deference in his choice of a maximum award, since "he, and not the appellate court, was present during the ebb and flow of the trial." Bonura, supra, at 670. As we stated in

Bonura, we will assume that the amount remaining after the remittitur reflects the maximum possible award "unless the party opposed to the remittitur can point to credible evidence which would support a greater recovery." Id. In the light of the record before us, we are unable to say that the trial judge's choice was incorrect.

Jury Instructions

Delesdernier's third point of error concerns remarks which the trial judge made at the first trial. Delesdernier testified at the trial that the August 17 letter she received from Porterie (accusing her of illegally removing files from Porterie's office) showed his secretary's initials on it, indicating

that Porterie had dictated it to his secretary. The trial judge interrupted testimony at that point and stated that as a matter of law, a dictation to a secretary could not be publication within the meaning of the doctrine of defamation. Both sides are agreed that this is not a correct view of Louisiana law. However, at the close of the case the trial court gave what both sides agree is a correct instruction of the law, namely, that a defamatory remark is published if it is written or spoken to one other person other than the person it was intended for. See, e.g., Toomer v. Breaux, 146 723 (La.App.1962)(rule applies to non-privileged communications; as to privileged communications, reasonably necessary use of clerical personnel does not constitute publication). We need not decide whether the parties are correct in

assuming that the pre-instruction remarks were contrary to Louisiana law. Even assuming that the remarks stated the law incorrectly, Delesdernier's attorney made no objection to them at that point nor at any other point prior to this appeal. It is important that the parties make known to the trial court what omissions or commissions are objected to and why so that the trial court can act to correct errors if they are present, and ordinarily this court will not consider issues which are only raised for the first time on appeal. Wright v. Hartford Accident & Indemnnity Co., 580 F.2d 809 (5th Cir.1978). There is an exception to this rule where refusal to consider the issue would result in a miscarriage of justice, Calmaquip Engineering West Hemisphere Corp. v. West Coast Carriers, Ltd., 650 F.2d 633 (5th Cir. 1981); In Re Corrugated

Container Antitrust Litigation, 647 F.2d 460 (5th Cir. 1981), or where there is no opportunity to make a timely objection, In Re Novack, 639 F.2d 1274 (5th Cir. 1981). However, neither of these exceptions obtains here. Delesdernier has offered no reasons why counsel could not have objected to the trial court's remarks or specifically requested that the jury be instructed to disregard them. Moreover, since the trial judge corrected himself sua sponte in his final instructions, we are unconvinced that a miscarriage of justice results from our refusal to consider the issue now.

For similar reasons we think Delesdernier's fourth point of error is also untimely. Delesdenier argues that additional jury instructions given in the second trial were confusing to the jury. These instructions were given after the

jury had begun deliberations; the jury sent a note back to the judge requesting additional instruction on the one year period of prescription under Louisiana law. The judge called the jury in and gave additional instructions in the presence of of both counsel. After the instructions were given, Delesdernier's counsel was specifically asked if he had any objections to these instructions and he stated that he had none. He will not be heard to object now for the first time on appeal.

ADMISSIBILITY OF PORTERIE'S LETTER

Delesdernier's final point of error concerns a ruling of the district court at the second trial. During the trial, Delesdernier was questioned by her counsel

concerning the August 17 letter from Porterie (which had stated that she had illegally seized Porterie's files):

> Q. Was there anything in that letter that caused you distress?
>
> A. I worked with this man all those years and he gave me the key that I could come and go out with the papers and here he writes me this letter calling me a thief ---

At this point defense counsel objected and a lengthy bench conference followed. The trial judge sternly admonished Delesdernier for her continual habit of not responding directly to questions put to her, making speeches and engaging in gratuitous observations. An examination of the record indicates that indeed, Delesdernier had been consistently warned, both by Judge Beer at the second trial and by Judge Rubin at the first trial, that she was not to engage in this sort of activity, and that she had,

nevertheless, persisted in doing so. Defense counsel also objected to the question posed in that it was relevant only to the issue of defamation, an issue which was not under consideration at the second trial. The following exchanges occurred between defense counsel, Mr. Hunley, the court, and Delesdernier's counsel, Mr. Roy:

> MR. ROY: I am not trying to put it [the issue of defamation] before the Jury. Let me make my point. On mental anguish.
>
> THE COURT: As far as I'm concerned, however nebulose [sic], I'm going to let him [Mr. Roy] develop the question of mental anguish, that is before the Jury. That's all that is before the jury.

....

> MR. HUNLEY: I must respectfully object to the Court's ruling allowing the plaintiff to comment on the statements made in these notes about her entering the office illegally and taking the files without authority, that having been already passed upon by the Jury in favor of the defendant in the first trial when they ruled in favor of the defendant on the issue of

defamation.

THE COURT: As far as I am concerned, counsel for plaintiff is blameless. He did, as far as the Court is concerned nothing on his part to open up any area with respect to defamation. It's simply a part of the unsolicited unresponsive answers of the witness. I say to counsel, put the questions to the witness, solicit to her answers to be in order. Tell her that when you go back on the record before the Jury.

MR. ROY: Am I to understand the ruling that I can go into her mental anguish because he accused her of breaking the law?

THE COURT: No; mental anguish on the business of whether or not there has been any malpractice. That doesn't have anything to do with anything other than that. That's the sole issue here.

Delesdernier argues that this ruling prevented her counsel from introducting relevant evidence of the content of the letter and her reaction to it to establish the mental anguish she suffered as a result of Porterie's withdrawal from the case. We disagree. The language of the

trial court's ruling, both on its face and in the context of the discussion, is clear. Defense counsel's objections were overruled. Plaintiff's counsel was permitted to introduce evidence of the letter to the extent that it was relevant to mental anguish caused by Porterie's withdrawal from the case. Delesdernier's reactions to the allegedly defamatory comments within the letter would be admissible to the extent that they showed that Porterie was negligent in his representation of Delesdernier and this poor representation caused her anguish. They would not, as plaintiff's counsel suggested, be admissible simply because Porterie accused Delesdernier of breaking the law. We think no reversible error was made as to this ground. The judgment of the district court is affirmed.

AFFIRMED.

APPENDIX B

EXCERPT OF TRANSCRIPT

P R O C E E D I N G S

MORNING SESSION

(February 14, 1977)

(Whereupon the following proceedings were had in Chambers, Monday, February 14, 1977:)

THE COURT:

The case that was ahead of you has been settled. Now, I'm not going to make you go to trial today if you are not ready, because I told you that we would try the other case first.

However, in view of Carnival and other things, if you can get your houses

in order and start sometime later in the day, I will be available, but I need to know in order to tell the jury that we will select this morning, then, to be here.

MR. HUNLEY:

Well, may I ask this question before I answer Your Honor.

(To Mr. Chesnutt)

About how long do you think that you are going to take with your case? You think you'll be through in one day?

MR. CHESNUTT:

I think if we began this afternoon the Plaintiff can be finished by tomorrow afternoon, probably, at the latest.

MR. HUNLEY:

Then I would be prepared to go.

THE COURT:

This afternoon?

MR. HUNLEY:

I can start this afternoon.

THE COURT:

1:30, is that a good time for both of you?

MR. CHESNUTT:

All right, sir.

THE COURT:

All right. Now, yesterday, in a telephone conversation, Mr. Chesnutt mentioned to me that he was considering waiving a jury trial. It seems to me that I ought, in Mrs. Delesdernier's presence, to put some facts on the record. I do not believe that I should try this case without a jury. If both parties really want a non-jury trial, then I would re-allot the case. But I think Mrs. Delesdernier ought to hear.

Is she available?

MR. CHESNUTT:

Your Honor, her mother was waiting

for her downstairs. She's coming from Slidell. I believe she's here now. I haven't seen her, though.

THE COURT:

You want to stop in the Courtroom and see if she is there, Mr. Chesnutt, and invite her to come in. You can go through that side door to your left as you come in.

(Whereupon Mr. Chesnutt and Mrs. Delesdernier re-entered the conference room in Chambers, whereupon the following proceedings were held)

THE COURT:

Yesterday afternoon, Mr. Chesnutt mentioned to me that both parties were considering the possibility of a non-jury trial. You do have a right to a non-jury trial, if you want one; and if you do elect to have one, I would ask another judge to hear the case, because while I

don't believe I know either Mr. Porterie or Mr. Duke well enough to prevent me from presiding over a jury trial, I do believe that if a matter came down to credibility of witnesses, that I would not want a juror sitting in the case who knew the parties to that degree.

So, I will state on the record what my acquaintanceship with them is. I taught Mr. Porterie when he was in law school, which I've taught tort pupils since 1946. I don't remember what year it was. I have the vague impression it was about '47 or '48, right after the end of World War II. I've known them casually ever since then. I think he has tried perhaps one or two cases in my court in the ten years I've been a judge, but I have known him, and to some mild degree , his family for many years. His father was a Federal Judge in Alexandria, where I'm

from, and I knew Judge Porterie in a casual way both before I was a lawyer and after I was a lawyer.

Mr. Duke is an ardent fisherman and boater. I used to fish with Judge Cassibry who, until about two months ago, had a medium-size fishing boat, nothing very palatial, but he used to tie it up in Mississippi at someplace whose name I can't recall. It was a very small privately-owned wharfing facility, and Claude Duke's boat, which was considerably larger, was in the next slip. So, once in a while, when we would come in from fishing, Claude Duke would be there, and we'd exchange greetings and have a drink from time to time. Usually , Judge Cassibry and I were in a hurry. What we had was one drink as a sort of social act, although on one occasion I remember that we sat around and ate some fried eggplant

and that Mr. Duke is fond of making, and considers himself a great chef at.

I believe the only other social contact I've had with either of them is some weeks ago Judge Cassibry, Judge Boyle, Claude Duke, and I had lunch together. Now, I don't believe I've ever been in Claude Duke's home or Louie Porterie's home. I'm quite confident neither of them has ever been in mine, unless they came by accident to have a court order signed, and we're not social friends. I don't know either of them any better than I know three or four hundred lawyers in New Orleans. But I do know three or four hundred lawyers well enough that I wouldn't want to be in the jury where they were on one side and non-lawyer was on the other side.

So, if you do wish to try the case to a jury, I see no reason to disqualify

myself. I can be, I think, completely objective in my rulings, and I don't have any feeling that my degree of friendship with either of them would affect any legal rulings I make. I do have a feeling that my degree of acquaintanceship with them might have some weight one way or the other in weighing credibility if either or both of them testify. It might, indeed, weigh against them. I'm not sure. It might be that I would lean over backwards. But, in either event, they are entitled to someone who will neither lean forwards nor backwards but just stay straight up in the middle.

So, the net of that is that if you and Mr. Chesnutt decide that you do want a non-jury trial, I won't require you to have a jury trial, but I will re-allot the case to another judge. That's what we do all the time when that problem arises.

I'll give you a minute to talk about that. I do want to go ahead and talk about something else, because in the course of our conference on Friday, it became apparent to me, although Mr. Hunley says that he had not perceived it in this fashion, that the Plaintiff in this case was claiming damages or seems to be claiming damages for two things. One is a breach of contract, and the other is what may be called a malpractice or negligent claim.

Now, with respect to breach of contract, a recent decision by the Louisiana Supreme Court, which came out after this case was filed and, indeed, I think after the last motions were heard in the case, but which binds me because in a case based on diversity of citizenship I must follow Louisiana law, the Louisiana Supreme Court held that if you are suing

for a breach of a contract, you can recover only monetary damages and not any damages for mental suffering or anguish or humiliation or embarrassment. The Court said that if a contract has emotional gratification as its purpose, you can only recover monetary damages.

Now, Mr. Hunley raised that case in our discussion last week, as he's entitled to do before I charge the jury. Therefore, to the extent that you are proceeding, Mrs. Delesdernier, on a claim for breach of contract, you could recover only monetary damages and not any emotional distress. I suggested that you might also be proceeding on a tort claim, that is, a claim for negligence or malpractice. On that claim you could recover any damages for mental distress and that sort of thing, but you could only go back one year from the time the suit

was filed, because a lawsuit for tort must be filed within one year of the occurrence, and you could only sue for those negligent acts that you can show Mr. Porterie or his law firm performed within one year prior to the time suit was filed.

Now, Mr. Hunley then said on Friday that he was going to file a motion to limit the claim to that amount. He says he'd already done it in his answer in the lawsuit, and I said, "Well, better do it more expressly."

At any rate, you can work this matter out, decide what you want to do, and what your theory of the case is after we select a jury, and I'll hear from each of you further on that.

I wanted to say what I had to say about it before we select a jury so you'll have that time to think about it.

The only question I need answered

right here is whether you want to go forward with a jury trial or whether you want a non-jury trial.

If you want a chance to talk to Mr. Chesnutt outside, you may do so.

MRS. DELESDERNIER:

No, that's all right, Your Honor.

Number one, if I recall, when we had a hearing of here one day, Mr. Hunley said this case that you are talking about had just been rendered. So, recalling that, I imagine that the decision didn't come out until after my suit was filed.

THE COURT:

That is correct.

MRS. DELESDERNIER:

Secondly, I wanted a jury trial because I realize that I don't know your background, Your Honor, and I'm not asking all of your background.

THE COURT:

You are entitled to have it.

MRS. DELESDERNIER:

I know judges have been attorneys before they're judges, and for that reason, I want a jury trial.

THE COURT:

Well, you are entitled to it. So, that's the only answer I need.

MRS. DELESDERNIER:

And, well, I think there's one more thing.

In addition, I think the way I'm claiming is not only a breach of contract and negligence and all of that, but also slander, because I have to work for a living, and for someone to accuse me of going in his office without authority and taking papers, Your Honor --

THE COURT:

Well, I don't know whether -- I don't know one way or the other about that. I

express no opinion about whether the slander count is raised in the complaint or not.

MRS. DELESDERNIER:

Yes, sir.

MR. HUNLEY:

Yes, it is.

MRS. DELESDERNIER:

Yes, sir.

THE COURT:

All right, fine. Then you are entitled to claim that for any events claimed for one year up to the filing of the lawsuit.

MRS. DELESDERNIER:

Yes, sir.

THE COURT:

Okay. Fine.

MR. HUNLEY:

Judge, this is the motion. I typed the motion. I typed it myself, and I've

asked Mr. Chesnutt to read this.

THE COURT:

All right. We'll file it in the record.

MR. HUNLEY:

Thank you, Your Honor.

THE COURT:

I'll hear you on it later.

Let's select a jury.

MR. HUNLEY:

You asked us at the hearing on Friday about voir dire. I had submitted a few general questions. Did you get them?

THE COURT:

I had them filed. If not, do you have your file copy? I'll use that. I can get it, and it'll take me a minute to find it.

Fine.

(Whereupon proceedings in Chambers were recessed, after which juries in Civil

Action 73-2136-C and Civil Action 76-14044-C were selected in open court.)

(END OF EXCERPT)